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Principal and Surety--Duress of a Principal as Defense for Surety

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PRINCIPAL AND SURETY—DURESS OF A PRINCIPAL AS DEFENSE FOR SURETY.—The defendant as indorser on a promissory note seeks to avoid liability, in a suit by the holder against the indorser, on the ground that the note was obtained from the maker by reason of duress practiced upon him by the holder. The maker of the note was indebted to the holder thereof for the sum of $1,540, and was forced to sign the note under threat of imprisonment. Defendant became surety in ignorance of such duress. *Held,* duress practiced by holder on maker of note is available as defense to surety indorsing instrument in ignorance thereof or of facts sufficient to put him on inquiry. *Bank of Clinchburg* v. *Carter,* 133 S. E. 370 (W. Va. 1926).

In support of this conclusion the court cited *Patterson* v. *Gibson,* 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356; *Graham* v. *Marks,* 98 Ga. 67, 25 S. E. 931; *Griffith* v. *Sitgreaves,* 90 Pa. 161; *Hazard* v. *Griswold,* 21 F. 178, and 9 R. C. L. 730, as cases in point. These cases have been generally so cited. It will be found that it is at least questionable whether these cases are authority for the conclusion reached by the court. In *Patterson* v. *Gibson,* 81 Ga. 802, the decision seems to have been controlled by statute, as the court cites Code, art. 2148-2149, in deciding the question. The remarks of the court relative to the common law doctrine have not the force of a decision and were not necessary to the decision in the case. In *Graham* v. *Marks,* 98 Ga. 67, the defendant signed a note as surety with full knowledge of the duress of his principal, to bring about the discharge of the principal from lawful custody, and the demurrer to defendant's plea was upheld. In the syllabus to this case it is stated that, "As a general rule, a promissory note executed under the duress of a principal by legal imprisonment is not void as to a surety thereon, if the latter, being under no duress, and knowing of the duress of the principal, nevertheless voluntarily signed the note." Can this statement be construed as meaning that if the surety has not knowledge of the principal's duress, he may plead such duress to escape liability? The court further decided that the defendant's plea was bad as the defendant should have alleged the principal's imprisonment to be illegal, or if legal, for an illegal purpose, and also that a plea attempting to allege that a promissory note was given in whole or in part for the purpose of

settling the prosecution for a criminal offense (which was actually the case) is not legally complete unless it alleges facts showing that the person to be prosecuted was charged with having committed an act or acts constituting a crime or misdemeanor. This case decided a point of pleading rather than the availability to the surety of duress practiced on his principal as a defense. In 9 R. C. L. 729, 730, it is stated that the ignorance of the surety of the duress enables the surety to plead such duress, but *Patterson* v. *Gibson* is the authority for the statement. While a great many cases are cited by the courts which hold that to make the surety liable he must be shown to have knowledge of the duress, most of the older cases were decided on a point of pleading or because of statutory regulations. In this connection it is interesting to note that in *Griffith* v. *Sitgreaves*, 90 Pa. 161, practically all of the older cases are discredited for that reason, or because it appeared that the surety was the father of the principal and was therefore allowed to plead duress of his principal as it was said this was an exception to the general rule. However, the court in that case allowed the surety to plead duress because, not having knowledge, he is misled thereby and deprived of his remedy against the principal. *Hazard* v. *Griswold*, 21 Fed. 178, is in accord but cites *Griffith* v. *Sitgreaves* and the cases expressly discredited therein, and fails to give reasons for the decision. *Griffith* v. *Sitgreaves* is perhaps the best case illustrating the conclusion reached by the West Virginia court. But does the reason there stated apply to cases of like nature? "A contract made under duress is ordinarily voidable and not void * * * * and may be ratified by the injured party after the duress has been removed. As a general rule only the person on whom the duress was exercised may take advantage of it to avoid the contract." (13 C. J., 398) "Duress by a third person will not avoid a contract made with a party who was not cognizant of it." (13 C. J. 403) "Duress of a principal will not excuse and cannot be pleaded by a surety, (13 C. J. 404) although the contrary has been held as to statutory bonds." *State* v. *Brantley*, 27 Ala. 44; *Fisher* v. *Shattuck*, 17 Pick. (Mass.) 252; *Thompson* v. *Lochwood*, 15 Johns. (N.Y.) 256. These cases of statutory bonds have often been held as authority for the general proposition that the surety's ignorance of the duress enables him to

plead such duress, although they were decided under statutes which determined the surety's liability in such situations. As duress is a personal defense, should ignorance thereof excuse the surety? Where S is surety on the contract of an infant principal, his ignorance of the principal's infancy does not excuse him if the creditor seeks to hold him liable. (32 Cyc. 27) Suppose the principal is insane? A married woman? Can the surety defend on the ground that he contracted in ignorance of these circumstances? In those cases he is deprived of his remedy against the principal. Is he misled more when the principal has the defense of duress? In the West Virginia case and the majority of cases holding in accord there was an existing debt owed from the principal to the creditor at the time creditor, by duress, secured the note from the principal. Arguments of counsel often claim that if the surety is not allowed to set up the duress of his principal (the surety being in ignorance thereof) that A at the point of a gun can force B to sign a promissory note, under seal, on which C becomes surety, (not knowing of the duress) and hold C for the amount of the note. In such a case C should be allowed the defense of duress, for there the duress goes to the whole consideration; it is a defense inherent in the thing itself. But in the ordinary case where the consideration for the note is an existing debt, of which the note is evidence, the duress by which the note is obtained is a mere personal defense, and should be available only to the principal. This distinction is noted in *Putnam* v. *Schuyler*, 4 Hun. (N.Y.) 166. It is submitted that it should have been considered by the West Virginia court in this case.

—H. R. W.